

REMARKS**Overview**

Claims 1-40 are pending in the present application. Claims 1-40 have been rejected. A 37 C.F.R. § 1.131 Declaration is attached with this Amendment showing invention prior to the earliest effective date of U.S. Patent No. 6,853,975 to Dirksen et al., newly cited in the Final Rejection. It thereby removes Dirksen as a prior art reference. Entry of this Amendment After Final is respectfully requested.

Improper Final Rejection

On January 12, 2006, the Examiner rejected all pending claims 1-40 of the present application under 35 U.S.C. § 103 using U.S. Patent No. 6,853,975 to Dirksen, in light of various other patents. Dirksen had not been previously cited. With this rejection, the Examiner issued an improper Final Rejection.

37 C.F.R. § 1.113(a) states in part that "on the second or any subsequent examination or consideration by the Examiner the rejection or other action may be made final . . ." however, MPEP § 706.07 clarifies this stating:

Before final rejection is in order a clear issue should be developed between the examiner and applicant. To bring the prosecution to as speedy conclusion as possible and at the same time to deal justly by both the applicant and the public, the invention as disclosed and claimed should be thoroughly searched in the first action and the references fully applied; and in reply to this action the applicant should amend with a view to avoiding all the grounds of rejection and objection. Switching from one subject matter to another in the claims presented by applicant in successive amendments, *or from one set of references to another by the examiner in rejecting in successive actions claims of substantially the same subject matter, will alike tend to defeat obtaining the goal of reaching a clearly defined issue for an early termination, i.e., either an allowance of the application or a final rejection.*

While the rules no longer give to the applicant the right to 'amend as often as the examiner presents new references or reasons for final rejection,' *present practice does not sanction hasty and ill-considered final rejections. The applicant who is seeking to define his or her invention and claims that will give him or her the patent protection to which he or she is justly entitled should receive the cooperation of the examiner to that end, and not be prematurely cut off in the prosecution of his or her application. . . .*

The examiner should never lose sight of the fact that in every case the applicant is entitled to a full and fair hearing, and that a clear issue between applicant and examiner should be developed, if possible, before appeal. . . ." (*Emphasis added*).

The Office Action dated January 12, 2006 rejected all pending claims in the present application, in light of U.S. Patent No. 6,853,975 to Dirksen. Dirksen had not previously been used or referred to in the prosecution of the present application. Thus, as specifically stated in MPEP § 706.07 a clearly defined issue has not been developed between the Examiner and the Applicant because the Examiner has switched from one set of references to another in successive actions for claims of substantially the same subject matter. In fact, claim 1 and its depending claims were not amended and were exactly the same subject matter in the successive actions. Therefore, the Examiner has not met his burden of clearly defining the issues by allowing the Applicant a chance to response to the Dirksen reference before a final rejection was issued. Therefore, the final rejection was improperly issued and should be withdrawn.

To further support this argument, MPEP § 706.07(a) states in part that "a second or any subsequent action on the merits in any application . . . *will not be made final* if it includes a rejection, on newly cited art, . . . *of any claim not amended by applicant or patent owner in spite of the fact the other claims may have been amended to require newly cited art.*" While it is true that Applicant's amendment may necessitate new grounds of rejection requiring a final rejection

at times, claim 1 has not been amended and therefore a final rejection on claim 1 and its depending claims is improper. Furthermore, MPEP § 706.07(a) further states that "a second or any subsequent action on the merits in any application . . . should *not* be made final if it includes a rejection, on prior art not of record, of any claim amended to include limitations which should reasonably have been expected to be claimed." Here again, the Examiner should have expected amendments which do not limit, but simply further define the invention, in an Amendment dated October 27, 2005 in response to Office Action dated June 27, 2005. Once again, the final rejection on all claims is improper and should be withdrawn. Applicant is not now petitioning to withdraw the final, assuming the Examiner will enter the below discussed Rule 131 Declaration.

Seasonable Presentation of Declaration Under 37 C.F.R. § 1.131

The enclosed 37 C.F.R. § 1.131 Declaration predates the earliest effective date of November 10, 1999 of U.S. Patent No. 6,853,975 to Dirksen. MPEP § 715.09 states that

Affidavits or declarations under 37 C.F.R. § 1.131 must be timely presented in order to be admitted. Affidavits and declarations submitted under 37 C.F.R. § 1.131 and other evidence traverses rejections are considered timely if submitted:

- (a) prior to a final rejection; . . .
- (c) after final rejection, but before or on the same date of filing an appeal, upon a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented in compliance with 37 C.F.R. § 1.116(e).

Applicant submits that, as discussed above, the final rejection is improper and should be withdrawn. Certainly the 37 C.F.R. § 1.131 Declaration enclosed is seasonably presented under MPEP § 715.09(a). In any event, the enclosed 37 C.F.R. § 1.131 Declaration is still seasonably presented after final rejection upon a showing of good and sufficient reasons why the declaration or other evidence is necessary and was not earlier presented. Applicant submits that Applicant

has a good and sufficient reason why the Declaration was not earlier presented since the reference being sworn behind, namely U.S. Patent No. 6,853,975 to Dirksen, was not previously used by the Examiner. Thus, the Applicant could not earlier present a Declaration to swear behind Dirksen. Therefore, entry of the enclosed 37 C.F.R. § 1.131 Declaration is respectfully requested to allow ante-dating of Dirksen.

In light of the improper final rejection and the seasonably presented 37 C.F.R. § 1.131 Declaration swearing behind the Dirksen reference, the Examiner has not made a *prima facie* case for rejecting any of the pending claims in the present application. The Examiner implies that certain elements in the supplemental references do not disclose or suggest all elements of the pending claims in the present application without Dirksen. Applicants agree. Thus, without the Dirksen reference available as prior art, the Examiner's rejections are defective and should be withdrawn. A Notice of Allowance of all pending claims is respectfully requested.

Conclusion

Claims 1-40 are pending in the present application, all of which have been rejected. The Examiner's final rejection is improper and should be withdrawn. In addition, a Declaration is included to remove U.S. Patent No. 6,853,975 to Dirksen as a prior art reference and thus all claim rejections fail and should be withdrawn. A Notice of Allowance of all pending claims is respectfully requested.

This is an earnest attempt to put all claims in proper form for immediate allowance. If, however, the Examiner does not believe that all claims are in proper form for immediate allowance, the Examiner is specifically requested to contact Applicant's attorney at the below-identified telephone number to remedy any outstanding issues.

No fees or extensions of time are believed to be due in connection with this amendment; however, consider this a request for any extension inadvertently omitted, and charge any additional fees to Deposit Account No. 26-0084.

Respectfully submitted,



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Enclosure: 37 C.F.R. § 1.131 Declaration and Exhibits